

(2) Construction (see part 36);

(3) Utility services (see part 41); or

(4) Services that are incidental to supply purchases.

(b) Agencies shall generally rely on the private sector for commercial services (see OMB Circular No. A-76, Performance of Commercial Activities and subpart 7.3).

(c) Agencies shall not award a contract for the performance of an inherently governmental function (see subpart 7.5).

(d) Non-personal service contracts are proper under general contracting authority.

(e) Agency program officials are responsible for accurately describing the need to be filled, or problem to be resolved, through service contracting in a manner that ensures full understanding and responsive performance by contractors and, in so doing, should obtain assistance from contracting officials, as needed.

(f) Agencies shall establish effective management practices in accordance with Office of Federal Procurement Policy (OFPP) Policy Letter 93-1, Management Oversight of Service Contracting, to prevent fraud, waste, and abuse in service contracting.

(g) Services are to be obtained in the most cost-effective manner, without barriers to full and open competition, and free of any potential conflicts of interest.

(h) Agencies shall ensure that sufficiently trained and experienced officials are available within the agency to manage and oversee the contract administration function.

[61 FR 2630, Jan. 26, 1996, as amended at 62 FR 12694, Mar. 17, 1997; 62 FR 44815, Aug. 22, 1997]

### **37.103 Contracting officer responsibility.**

(a) The contracting officer is responsible for ensuring that a proposed contract for services is proper. For this purpose the contracting officer shall—

(1) Determine whether the proposed service is for a personal or nonpersonal services contract using the definitions in 37.101 and the guidelines in 37.104;

(2) In doubtful cases, obtain the review of legal counsel; and

(3) Document the file (except as provided in paragraph (b) below) with (i) the opinion of legal counsel, if any, (ii) a memorandum of the facts and rationale supporting the conclusion that the contract does not violate the provisions in 37.104(b), and (iii) any further documentation that the contracting agency may require.

(b) Nonpersonal services contracts are exempt from the requirements of subparagraph (a)(3) above.

(c) Ensure that performance-based contracting methods are used to the maximum extent practicable when acquiring services.

(d) Ensure that contracts for child care services include requirements for criminal history background checks on employees who will perform child care services under the contract in accordance with 42 U.S.C. 13041, as amended, and agency procedures.

[48 FR 42365, Sept. 19, 1983, as amended at 55 FR 36796, Sept. 6, 1990; 59 FR 67051, Dec. 28, 1994; 62 FR 233, Jan. 2, 1997; 62 FR 44815, Aug. 22, 1997; 62 FR 51379, Oct. 1, 1997]

### **37.104 Personal services contracts.**

(a) As indicated in 37.101, a personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

(b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. 3109) to do so.

(c)(1) An employer-employee relationship under a service contract occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or

control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.

(2) Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract? The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account (see (d) below).

(d) The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:

- (1) Performance on site.
- (2) Principal tools and equipment furnished by the Government.
- (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
- (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- (5) The need for the type of service provided can reasonably be expected to last beyond one year.
- (6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to—
  - (i) Adequately protect the Government's interest;
  - (ii) Retain control of the function involved; or
  - (iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.
- (e) When specific statutory authority for a personal service contract is cited, obtain the review and opinion of legal counsel.
- (f) Personal services contracts for the services of individual experts or consultants are limited by the Classification Act. In addition, the Office of Per-

sonnel Management has established requirements which apply in acquiring the personal services of experts or consultants in this manner (e.g., benefits, taxes, conflicts of interest). Therefore, the contracting officer shall effect necessary coordination with the cognizant civilian personnel office.

#### **37.105 Competition in service contracting.**

(a) Unless otherwise provided by statute, contracts for services shall be awarded through sealed bidding whenever the conditions in 6.401(a) are met (except see 6.401(b)).

(b) The provisions of statute and part 6 of this regulation requiring competition apply fully to service contracts. The method of contracting used to provide for competition may vary with the type of service being acquired and may not necessarily be limited to price competition.

[50 FR 1744, Jan. 11, 1985, and 50 FR 52429, Dec. 23, 1985]

#### **37.106 Funding and term of service contracts.**

(a) When contracts for services are funded by annual appropriations, the term of contracts so funded shall not extend beyond the end of the fiscal year of the appropriation except when authorized by law (see paragraph (b) of this section for certain service contracts, 32.703-2 for contracts conditioned upon availability of funds, and 32.703-3 for contracts crossing fiscal years).

(b) 41 U.S.C. 253I, as amended by Section 1073 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355), authorizes the head of any executive agency except the Department of Defense, United States Coast Guard, and the National Aeronautics and Space Administration (41 U.S.C. 252(a)(1)), to enter into a basic contract, options, or orders under that contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the basic contract, options or orders under that contract does not exceed one year each. Funds made available for a fiscal year may be obligated for the total amount of an